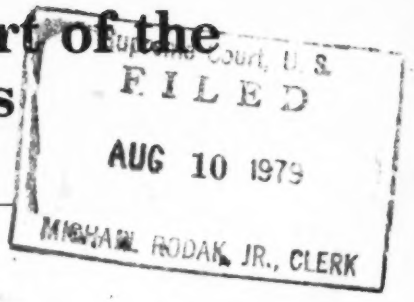
In the Supreme Court of the United States

October Term, 1979

No. ~~79-225~~



JULIA ANN SALAS,

Petitioner,

v.

MIGUEL MARTINEZ CORTEZ,

Respondent.

DAVID M., a Minor, by FRANK J. ADAMICH, his Guardian Ad Litem, and COUNTY OF VENTURA,

Petitioner,

v.

DAVID DURAN CASTELLANOS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners are plaintiffs in two separate civil paternity proceedings which were consolidated for purposes of hearing and argument in the California Supreme Court, and one opinion treating both cases issued from the California Supreme Court.

Petitioner Julia Ann Salas, and petitioners David M. and the County of Ventura respectfully pray that a writ of

certiorari issued from this Honorable Court to review the judgments and opinion of the California Supreme Court filed April 11, 1979, upon which rehearing was denied on May 16, 1979.

OPINION BELOW

The opinion of the California Supreme Court reversing the judgments appear in Appendix A of this petition, together with the dissenting opinion. It is reported at 24 Cal.3d 22, 154 Cal. Rptr. 529, 593 P.2d 226 (1979). After issuance of the opinion, petitioners sought rehearing, Rehearing was denied. No new opinion issued upon rehearing; a copy of the order denying rehearing appears in Appendix B.

Prior to the hearing before the California Supreme Court, the Superior Court for the County of Ventura had found each respondent to be the father of the child in his respective case and had ordered each respondent to pay child support through the Office of the Ventura County District Attorney. The Court of Appeal of the State of California affirmed the judgments in a consolidated appeal later vacated when the California Supreme Court granted hearing. The opinion of the Court of Appeal of the State of California is reproduced in Appendix C, together with the dissenting opinion, and is found at 145 Cal. Rptr. 727 (1978).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

The judgment of the California Supreme Court was originally filed on April 11, 1979. Petitioners filed a petition for rehearing which was denied by the California

Supreme Court on May 16, 1979. This petition for writ of certiorari was filed within 90 days of that date as required by 28 U.S.C. section 2101(c). (See Stern and Gressman (5th Ed. 1978), Supreme Court Practice § 6.3; *Market Street Railway Co. v. Railroad Commission of California* (1945) 324 U.S. 548, 552.)

QUESTIONS PRESENTED

Are indigent defendants in civil paternity actions constitutionally entitled to court appointed counsel where the state appears as a party plaintiff or appears on behalf of the plaintiff mother or child?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ". . ."

STATUTORY PROVISIONS

United States Code, Title 42, section 654 in relevant part:

> "A State plan for child support must —

". . . .

"(4) provide that such state will undertake —

"(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, and

"(B) in the case of any child with respect to whom such assignment is effective, to secure support for such child from his parent . . . .

"(6) provide that (A) the child support collection or paternity determination services established under the plan shall be made available to any individual not otherwise eligible for such services upon application filed by such individual with the State, (B) an application fee for furnishing such services may be imposed, except that the amount of any such application fee shall be reasonable, as determined under regulations of the Secretary, and (C) any costs in excess of the fee so imposed may be collected from such individual by deducting such costs from the amount of any recovery made; . . ."

California Welfare and Institutions Code section 11350.1 in relevant part:

"Notwithstanding the provisions of any other statute, in any action brought by the district attorney for the support of a minor child or children, the action may be prosecuted in the name of the county on behalf of such minor child or children. The mother shall not be a necessary part in such action but may be subpoenaed as a witness . . . ."

California Welfare and Institutions Code section 11475.1 in relevant part:

"Each county shall maintain a single organizational unit located in the office of the district attorney which shall have responsibility for promptly and effectively enforcing the obligation of parents to support their children and determining paternity in the case of a child born out of wedlock. The district attorney shall take appropriate action, both civil and criminal, to enforce this obligation when the child is receiving public assistance and when requested to do so by the individual on whose behalf the enforcement efforts will be made when the child is not receiving public assistance . . . ."

California Civil Code section 7006 in relevant part:

"(a) A child, the child's natural mother, or a man presumed to be his father under paragraph (1), (2) or (3) of subdivison (a) of section 7004, may bring an action as follows:

"(1) At any time for the purpose of declaring the existence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of section 7004.

". . . .

(c) An action to determine the existence of the father and child relationship with respect to a

child who has no presumed father under section 7004 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

". . . .

"(f) The district attorney may also bring an action under this section in any case in which he believes that the interests of justice will be served thereby."

California Penal Code section 270 in relevant part:

"If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If a court of competent jurisdiction has made a final adjudication in either a civil or a criminal action that a person is the parent of a minor child and the person has notice of such adjudication and he or she then willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not

exceeding one year or in a state prison not exceeding one year and one day, or by a fine not exceeding one thousand dollars ($1,000), or by such fine and imprisonment . . . .

". . . .

"The provisions of this section are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

". . . ."

STATEMENT OF THE CASE

A. Proceedings in the California Superior Court in *Salas v. Cortez*.

The proceedings are set out in the opinion of the California Supreme Court at 24 Cal.3d 22, 24-25, reproduced at Appendix A, pages 20-21, as follows:

"Julia Salas, the mother of a child born out of wedlock, received welfare benefits from Ventura County under the Aid to Families with Dependent Children (AFDC) program. Suit was filed in order to (1) establish that Miguel Martinez Cortez was the father of the child and (2) obtain child support. The Ventura County District Attorney represented Mrs. Salas in this action.

"After appellant was personally served, he answered the complaint in propria persona denying all allegations. The district attorney

then sent appellant a seven-page set of interrogatories. When the district attorney moved to compel answers to these interrogatories, appellant requested court-appointed counsel. A declaration, prepared with the assistance of the Ventura County Legal Aid Association, was submitted by appellant denying he was the father of the child. He further declared that he could not speak, read or write English and, therefore, did not understand the numerous documents filed by the district attorney. Although presently an unemployed farm worker, ordinarily he earned about $400 per month to support his wife and their two children. Unable to afford the $500 requested by private counsel, appellant made several unsuccessful efforts to obtain free counsel from the Ventura County Legal Aid Association and the California Rural Legal Assistance Foundation. Although he qualified for their services, both organizations informed him that they had insufficient staff to handle any more paternity and child support cases. Counsel was not appointed by the court.

"At a subsequent hearing, an interpreter was appointed and appellant was ordered to answer the district attorney's interrogatories. Subsequently the district attorney served a request for admissions pursuant to Code of Civil Procedure section 2030, asking appellant to admit, 'That defendant is the father of [the child],' and that 'defendant is able to pay child support in the amount of seventy-five dollars ($75.00) for support of [the child] . . . .' Neither the interrogatories nor the district attorney's request for

admissions was answered. The district attorney warned appellant that he intended to obtain a judgment based on the unanswered request for admissions.

"Appellant did not appear for trial on May 12, 1976. The child's mother testified briefly and the statements in the unanswered request for admissions were deemed admitted. (Former Code Civ. Proc., § 2030, subd. (e); see Code Civ. Proc., § 2033, subd. (a).) Appellant was found to be the father of the child and was ordered to pay $75 per month child support and $300 for past support. Payments were to be made through the district attorney's office. This appeal and the designation of the record were filed on appellant's behalf by the Ventura County Legal Aid Association."

B. Proceedings in the California Superior Court in *David M.* and *County of Ventura v. Castellanos.*

The proceedings are set out in the opinion of the California Supreme Court, 24 Cal.3d 22, 25-26, reproduced at Appendix A, pages 21-22, as follows:

"David M., born out of wedlock, brought an action through his guardian ad litem, a family support officer in the Ventura County District Attorney's office, to declare appellant to be his father and to secure child support from him. The County of Ventura also sought reimbursement for support which it had already provided to the minor. The minor and the county were represented by the district attorney.

"After he was personally served, appellant answered in propria persona, denying all allegations, and requested court-appointed counsel. The Ventura County Legal Aid Association filed on his behalf a motion for appointment of counsel with points and authorities in support of the motion. Appellant declared that as an unemployed laborer he could not afford the fees of $500 to $1,000 of private counsel. The public defender declined to represent him because the action was civil in nature, and the Ventura County Legal Aid Association informed appellant that they no longer represented defendants in such cases although they would assist him in preparing a defense [footnote omitted]. The court denied appellant's request for counsel.

"Subsequently, interrogatories and a request for admissions were served on appellant, but went unanswered. Appellant did not appear for trial on June 9, 1976, and the matter was submitted on the unanswered request for admissions and testimony of the child's mother. This testimony had been given at an earlier hearing on a motion for temporary child support at which appellant was not present. On this record, appellant was found to be the father of the child, ordered to pay $50 per month child support, and $1,214 for past support. These monies were payable through the district attorney's office. The Ventura County Legal Aid Association filed the notice of appeal and designation of the record on appeal."

C. Subsequent Proceedings.

Both cases were appealed to the Court of Appeal of the State of California where the cases were consolidated for argument and hearing.

On April 23, 1978, the California Court of Appeal affirmed the judgments in both cases. One Justice dissented.

Respondents' petition for hearing to the California Supreme Court was granted, and on April 11, 1979, that court in a divided opinion, reversed both judgments on the ground that each respondent had been denied his constitutional right to counsel. Three of the seven justices on the California Supreme Court dissented. Thereafter petitioners sought rehearing. The petition for rehearing was denied on May 16, 1979.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE APPOINTMENT OF COUNSEL FOR INDIGENTS IN CIVIL PATERNITY ACTIONS; NOR DID PETITIONERS' REPRESENTATION AT TRIAL BY THE DISTRICT ATTORNEY VIOLATE RESPONDENTS' RIGHT TO DUE PROCESS OR EQUAL PROTECTION.

The California Supreme Court held that the judgments in these cases must be set aside because they were achieved through a denial of respondents' due process right to appointed counsel.[1] The essence of its holding is

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[1] In addition to the Fourteenth Amendment to the United States Constitution, the California Supreme Court also mentioned article I,

that the failure of the trial court to appoint counsel for respondents deprived them of a meaningful opportunity to be heard in a case where they were threatened with a loss of a fundamental right.

The California Supreme Court's holding requires appointment of counsel in civil paternity proceeding where the district attorney appears on behalf of the plaintiffs or in which the state appears as plaintiff, when the defendant is indigent and denies paternity.

Petitioners submit that there is no due process right to court-appointed counsel for indigent defendants in civil paternity actions and no fundamental constitutional rights of respondents were violated in these proceedings.

The touchstones of due process are flexibility and fairness. Essentially, due process requires that a defendant in a civil case be provided a meaningful opportunity for a hearing appropriate to the nature of the case. "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." (*Boddie v. Connecticut* (1971) 401 U.S. 371, 378 (footnote omitted).)

" '[C]onsideration of what procedures due process may

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section 7, subdivision (a) of the California Constitution. (Appendix A, p. 23.) However, if at issue at all, the "state constitutional holding depended upon the state court's view of the reach of the . . . Fourteenth Amendment." (*Delaware v. Prouse* (1979) ___ U.S. ___, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660, 667.) In its opinion the court relied on either United States Supreme Court cases (*e.g., Boddie v. Connecticut* (1971) 401 U.S. 371; *In re Gault* (1967) 387 U.S. 1; *Specht v. Patterson* (1967) 386 U.S. 605), or California cases which relied on United States Supreme Court cases, (*e.g., Payne v. Superior Court* (1976) 17 Cal.3d 908, relying *inter alia* on *Boddie v. Connecticut, supra*; *In re Love* (1974) 11 Cal.3d 179, relying on *Gagnon v. Scarpelli* (1973) 411 U.S. 778.)

require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by the government action.' " (*Wolff v. McDonnell* (1974) 418 U.S. 539, 560.)

The absolute due process requirement in criminal cases is that no person be imprisoned for an offense unless he is represented by counsel at trial. (*Argesinger v. Hamlin* (1972) 407 U.S. 25, 37.) It also requires the appointment of appellate counsel for indigents in criminal proceedings where an appeal is a matter of right. (*Douglas v. California* (1963) 372 U.S. 353, 356-358.) Unlike the absolute right to counsel mandated by specific provisions of both federal and state constitutions for individuals accused of criminal offenses, the right to counsel in other than criminal proceedings is conditioned and determined on a case by case basis. (Cf. *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790.) Clearly however, the nature of civil paternity actions is distinguishable from the limited situations in which this Court has required appointment of counsel in other than criminal proceedings.

This Court has not extended the right to counsel into the area of purely civil litigation. Respondents' essential interests in these actions are financial: Will they be required to contribute to the support of their children? Since respondents' interests are financial, petitioners submit they are not qualitatively different from those of any other civil litigant. The plaintiff in a paternity action cannot force the defendant to take the child in or to love the child. All a successful plaintiff can do is require the defendant to provide financial support for the child.

Indeed, the due process protection given to indigent criminal defendants has been found not to apply to

ordinary civil litigants whose primary interest in the outcome of a suit is financial. An indigent debtor has no constitutional right to the waiver of bankruptcy filing fees. (*United States v. Kras* (1973) 409 U.S. 434.) Recipients of social welfare benefits are not entitled to the waiver of filing fees for appellate review of a disputed increase in welfare benefits. (*Ortwein v. Schwab* (1973) 410 U.S. 656.)

It is abundantly clear that the weight of authority is against extension of the due process rights of criminal defendants to ordinary civil litigants who, like respondents, have basically a monetary interest in the outcome of the litigation.

The California Supreme Court based its decision in part upon the fact that civil paternity actions may have criminal consequences for defendants. The key word is "may." For, if there were to be any subsequent contempt actions[2] against respondents here or criminal prosecution of them,[3] such additional proceedings would result not from the court's judgment of paternity, but from respondents' willful failure to support their children. It would appear improper to assume that respondents will willfully violate an order of the superior court or will fail to provide such support as they can.

Petitioners submit that criminal prosecution is not a consequence of the civil judgment taken against respondents. (*See State v. Walker* (1976) 87 Wash.2d 443, 553 P.2d 1093, 1095, 1096.) No imprisonment is even

[2]In California contempt proceedings are regarded as quasi-criminal.

[3]California Penal Code section 270 punishes willful failure to provide support to a minor child.

threatened. (Cf. *Scott v. Illinois* (1979) ___ U.S. ___, 99 S.Ct. 1158, 1162, 59 L.Ed.2d 383, 389.)

The California Supreme Court pointed to possible consequences of an adjudication of paternity. (Appendix A, pp. 24-26.) However similar consequences can be found in divorces and dissolutions of marriage with regard to spousal and child support, intentional torts such as fraud, tax suits and other proceedings.

The California Supreme Court placed emphasis on the fact that the State represents the plaintiffs under the federal child support program (*See* 42 U.S.C. section 654.) In finding what amounts to a denial of equal protection (Appendix A, pp. 28-30), the California Supreme Court's equal protection analysis is unsound since in no lawsuit are the sides ever equally matched. "[T]he fact that a particular service might be of benefit to . . . [a] defendant does not mean that the service is constitutionally required." (*Ross v. Moffitt* (1974) 417 U.S. 600, 616.) California has no duty to "duplicate the legal arsenal that may be privately retained" by a defendant. It must only "assure the indigent defendant an adequate opportunity to present his claim fairly . . . ." *Ross v. Moffitt, supra,* at 616 (discussing rights of criminal defendants to counsel in seeking discretionary appeals). Here respondents were in no worse position than any other civil litigant.

The purpose of the statutes requiring the district attorney to bring paternity and support actions is one of social welfare and economics: The statutes are designed to have parents support their children and to permit children to know the identity of their parents. This policy of Congress is set out in 42 U.S.C. 651, and provides for the States to implement this policy. It should also be noted that Congress established and funded the federal Legal Services Corporation to provide legal assistance to indigents

(42 U.S.C. § 2996 *et seq.*) If there are any imperfections in the statutory schemes, they do not violate the Equal Protection Clause.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' . . ." (*Dandridge v. Williams* (1970) 397 U.S. 471, 485. *See also United States v. Kras, supra,* (1973) 409 U.S. 434, 436.)

There was, then, no equal protection requirement that counsel be appointed to represent respondents in these actions, nor were respondents' right to equal protection denied in the district attorney's representing petitioners.

Petitioners respectfully state that petitioners have no wish to deprive any litigant of the full benefits of the adversary system. However, the question here is not the desirability of having defendants represented by counsel in paternity proceedings or for that matter in any civil proceedings; the real question is whether such representation is constitutionally mandated. Petitioners submit that such representation by counsel in civil paternity proceedings is not constitutionally required and that whether counsel should or should not be provided is for Congress or for the California Legislature to determine. Respondents were denied neither due process nor equal protection of the laws in these proceedings.

CONCLUSION

For the foregoing reasons, petitioners submit that a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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APPENDIX

In the Supreme Court of the State of California

L.A. 30971
Super. Ct. No. D69373
Super. Ct. No. D74905
Filed April 11, 1979

JULIA ANN SALAS,

Plaintiff and Respondent,

v.

MIGUEL MARTINEZ CORTEZ,

Defendant and Appellant.

DAVID M., a Minor, etc., et al.,

Plaintiffs and Respondents,

v.

DAVID DURAN CASTELLANOS,

Defendant and Appellant.

In these consolidated appeals, this court must decide whether due process requires the appointment of counsel to represent indigent defendants in law suits brought at the behest of the state to determine the parentage of minor children.

I.

SALAS v. CORTEZ

Julia Salas, the mother of a child born out of wedlock, received welfare benefits from Ventura County under the Aid to Families with Dependent Children (AFDC) program. Suit was filed in order to (1) establish that Miguel Martinez Cortez was the father of the child and (2) obtain child support. The Ventura County District Attorney represented Mrs. Salas in this action.

After appellant was personally served, he answered the complaint in propria persona, denying all allegations. The district attorney then sent appellant a seven-page set of interrogatories. When the district attorney moved to compel answers to these interrogatories, appellant requested court-appointed counsel. A declaration, prepared with the assistance of the Ventura County Legal Aid Association, was submitted by appellant denying he was the father of the child. He further declared that he could not speak, read or write English, and therefore, did not understand the numerous documents filed by the district attorney. Although presently an unemployed farm worker, ordinarily he earned about $400 per month to support his wife and their two children. Unable to afford the $500 requested by private counsel, appellant made several unsuccessful efforts to obtain free counsel from the Ventura County Legal Aid Association and the California Rural Legal Assistance Foundation. Although he qualified for their services, both organizations informed him that they had insufficient staff to handle any more paternity and child support cases. Counsel was not appointed by the court.

At a subsequent hearing, an interpreter was appointed and appellant was ordered to answer the district attorney's

interrogatories. Subsequently the district attorney served a request for admissions pursuant to Code of Civil Procedure section 2030, asking appellant to admit "That defendant is the father of [the child]," and that "defendant is able to pay child support in the amount of seventy-five dollars ($75.00) for support of [the child] . . . ." Neither the interrogatories nor the district attorney's request for admissions was answered. The district attorney warned appellant that he intended to obtain a judgment based on the unanswered request for admissions.

Appellant did not appear for trial on May 12, 1976. The child's mother testified briefly and the statements in the unanswered request for admissions were deemed admitted. (Former Code Civ. Proc., § 2030, subd. (e); see Code Civ. Proc., § 2033, subd. (a).) Appellant was found to be the father of the child and was ordered to pay $75 per month child support and $300 for past support. Payments were to be made through the district attorney's office. This appeal and the designation of the record were filed on appellant's behalf by the Ventura County Legal Aid Association.

DAVID M. v. CASTELLANOS

David M., born out of wedlock, brought an action through his guardian ad litem, a family support officer in the Ventura County District Attorney's office, to declare appellant to be his father and to secure child support from him. The County of Ventura also sought reimbursement for support which it had already provided to the minor. The minor and the county were represented by the district attorney.

After he was personally served, appellant answered in propria persona, denying all allegations, and requested court-appointed counsel. The Ventura County Legal Aid

Association filed on his behalf a motion for appointment of counsel with points and authorities in support of the motion. Appellant declared that as an unemployed laborer he could not afford the fees of $500 to $1,000 of private counsel. The public defender declined to represent him because the action was civil in nature, and the Ventura Cou nty Legal Aid Association informed appellant that they no longer represented defendants in such cases although they would assist him in preparing a defense.[1] The court denied appellant's request for counsel.

Subsequently, interrogatories and a request for admissions were served on appellant, but went unanswered. Appellant did not appear for trial on June 9, 1976, and the matter was submitted on the unanswered request for admissions and testimony of the child's mother. This testimony had been given at an earlier hearing on a motion for temporary child support at which appellant was not present. On this record, appellant was found to be the father of the child, ordered to pay $50 per month child support, and $1,214 for past support. These monies were payable through the district attorney's office. The Ventura County Legal Aid Association filed the notice of appeal and designation of the record on appeal.

---

[1]The executive director of the Ventura County Legal Aid Association further declared that his office employs 7 attorneys and represents approximately 3,000 persons a year in diverse areas of civil law. He stated that this office represents 10 defendants in paternity actions, that filings by the Ventura County District Attorney in paternity and civil support actions had greatly increased as a result of federal funding, that his office had become involved in a disproportionate number of such actions to the detriment of their representation of other indigent civil litigants. Accordingly, he instructed the attorneys in his office not to accept any new paternity or support cases. Consequently, his office was unable to represent appellant.

II.

These consolidated cases present a narrow question: Are indigent defendants in paternity proceedings prosecuted by the state constitutionally entitled to appointed counsel?

The Fourteenth Amendment to the United States Constitution and article I, section 7, subdivision (a) of the California Constitution ensure that an individual may not be deprived of life, liberty or property without due process of law. Central to this constitutional right is the guarantee that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." (*Boddie v. Connecticut* (1971) 401 U.S. 371, 377; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914.) This has been held to include the right of a defendant to appointed counsel under certain circumstances, regardless of whether the action is labelled criminal or civil. (*In re Gault* (1967) 387 U.S. 1; *Specht v. Patterson* (1967) 386 U.S. 605, 608-610.) For example, where the deprivation the defendant faces is significant and the facts are complex, due process has been held to include the right of an indigent defendant to appointed counsel in certain civil proceedings. (*In re Love* (1974) 11 Cal.3d 179, 186, 190-191 [parole revocation]; *Cleaver v. Wilcox* (9th Cir. 1974) 499 F.2d 940, 944-945 [juvenile dependency proceedings]; see also *Reynolds v. Kimmons* (Alaska 1977) 569 P.2d 799 [paternity proceedings]; *Artibee v. Cheboygan Circuit Judge* (Mich. 1976) 243 N.W.2d 248 [paternity proceedings].)

The touchstone of due process is fundamental fairness. Whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings. (*In re Love, supra,* 11

Cal.3d at p. 190, fn. 11; see also *In re Jacqueline H.* (1978) 21 Cal.3d 170, 175-177.)[2] To determine the weight of appellants' claims to appointed counsel in the present cases, this court must examine the nature and magnitude of the interests involved, the possible consequences appellants face and the features which distinguish paternity proceedings from other civil proceedings. These factors must then be balanced against the state's interests.

The cases before this court involve more than monetary judgments. They were brought under statutory authority to declare the existence of the most basic biological relationship, that of parent and child. (Welf. & Inst. Code, §§ 11350.1, 11475.1; Civ. Code, §§ 7001, 7006; cf. *Boddie v. Connecticut, supra,* 401 U.S. at p. 383.) A determination of paternity has grave implications for all concerned — the alleged father, the child, the mother and the state. This court has termed the interest in maintaining a parent-child relationship "a compelling one, ranked among the most basic of civil rights . . . ." (*In re B.G.* (1974) 11 Cal.3d 679, 688; *Cleaver v. Wilcox, supra,* 499 F.2d at p. 945.) Freedom from an innocent imposition of that relationship on either a parent or a child is an equally compelling interest.

An adjudication of paternity may profoundly affect a person's life. It may disrupt an established family and

[2]The dissent's reliance on *Scott v. Illinois* (1979) ___ U.S. ___ [47 U.S.L. Week 4350] is misplaced. *Scott* is not the law in California. In this state, a person charged with a misdemeanor has a right to counsel regardless of whether a jail term actually is, or even could be, imposed. (*Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 766; *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 301.) Further, *Scott* does not even tangentially address the issue before this court, but is solely concerned with the right to counsel in misdemeanor proceedings.

damage reputations. Further, a court's determination of paternity exposes a defendant to deprivation of property and, potentially, liberty. It entails the obligation to support and educate a child (Civ. Code, §§ 196a, 7012), an obligation that does not end at the child's age of majority. (Civ. Code, § 206.)[3] Moreover, a child support order is more freely enforceably by garnishment than an ordinary civil judgment (15 U.S.C. § 1673(b)(1); Int. Rev. Code, § 6103(1)(6); Code Civ. Proc., § 690.6), and is not dischargeable in bankruptcy (11 U.S.C. § 35(a)(7)). Also, the failure to pay child support may be enforced through the civil contempt power (Civ. Code, § 7012), as well as the Uniform Civil Liability Act (Civ. Code, § 241 et seq.) and interstate assistance statutes (42 U.S.C. §§ 651-655; Code Civ. Proc., § 1650 et seq.). A judgment of paternity, even if taken by default, is res judicata in any subsequent civil enforcement proceeding. (Civ. Code, § 7010, subd. (a).)

Failure to support a child may also be prosecuted criminally. (Pen. Code, § 270.)[4] While an indigent is

[3]The consequences of a paternity judgment also reach beyond the grave — the child will succeed to the estate of the father if he dies intestate (Prob. Code, §§ 221, 222, 255), or share in the father's estate by will unless affirmatively excluded (Prob. Code, §§ 90, 91).

[4]Penal Code section 270 states in pertinent part:

"If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment. If a court of competent jurisdiction has made a final adjudication in either a civil or a criminal action that a person is the parent of a minor child and the person has notice of such adjudication and he or she then willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical

entitled to counsel if prosecuted criminally for nonsupport, the most significant element of the offense — paternity — may have already been determined in a civil proceeding in which the defendant was unrepresented by counsel. The prior civil judgment is admissible in criminal proceedings for nonsupport. (Pen. Code, § 270e.)[5]

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attendance or other remedial care for his or her child, this conduct is punishable by imprisonment in the county jail not exceeding one year or in a state prison not exceeding one year and one day, or by a fine not exceeding one thousand dollars ($1,000), or by both such fine and imprisonment. This statute shall not be construed so as to relieve such parent from the criminal liability defined herein for such omission merely because the other parent of such child is legally entitled to the custody of such child nor because the other parent of such child or any other person or organization voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child or undertakes to do so.

". . . .

"The court, in determining the ability of the parent to support his or her child, shall consider all income, including social insurance benefits and gifts.

"The provisions of this section are applicable whether the parents of such child are or were ever married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned."

[5]Penal Code section 270e states:

"No other evidence shall be required to prove marriage of husband and wife, or that a person is the lawful father or mother of a child or children, than is or shall be required to prove such facts in a civil action. In all prosecutions under either Section 270a or 270 of this code, Sections 970, 971, and 980 of the Evidence Code do not apply, and both husband and wife shall be competent to testify to any and all relevant matters, including the fact of marriage and the parentage of a child or children. Proof of the abandonment and nonsupport of a spouse, or of the omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such abandonment and nonsupport or omission to furnish

Although in the past a paternity suit was a private affair between a mother and the man she named as the father of her child, in recent years the state has assumed a greater role in bringing suits to determine parentage. (Gliaudys, *Paternity: A Reluctant Fatherhood* (1978) 53 State Bar J. 318.) Amendments to the Social Security Act which were passed in 1974 encouraged district attorneys to bring actions on behalf of minor children against absent parents to determine paternity and secure financial support. (42 U.S.C. § 651 et seq.) Those amendments appropriated federal funds "[f]or the purpose of enforcing the support obligations owed by absent parents to their children, locating absent parents, establishing paternity, and obtaining child support . . . ." (42 U.S.C. § 651.) Each state receiving federal funds for AFDC was required to adopt a plan for enforcing such obligations, and reimbursement was provided by the federal government for 75 percent of certain expenses involved in such enforcement activity. (42 U.S.C. §§ 654,655.)

California enacted new legislation to conform to federal law. (Stats. 1975, ch. 924, §§ 1-24, pp. 2030-2042.) As a condition of receiving AFDC, the parent receiving aid must now assign to the county any rights to support from

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necessary food, clothing, shelter or medical attendance is willful. In any prosecution under Section 270, it shall be competent for the people to prove nonaccess of husband to wife or any other fact establishing nonpaternity of a husband. *In any prosecution pursuant to Section 270, the final establishment of paternity or nonpaternity in another proceeding shall be admissible as evidence of paternity or nonpaternity.*" (Emphasis added.)

A prior civil judgment is not res judicata on the issue of paternity because of the higher standard of proof in criminal cases. (*Patterson v. Municipal Court* (1965) 232 Cal. App.2d 289, 302.) This appears to be the only instance where a civil judgment is admissible in a criminal proceeding for the truth of the matters stated in that civil judgment. (See Jefferson, Cal. Evidence Benchbook, § 9.1, pp. 125-128.)

any other person and must cooperate in establishing the paternity of a child born out of wedlock for whom aid is claimed. (Welf. & Inst. Code, §§ 11475.1, 11476.) The district attorney is authorized to bring an action on behalf of either the mother (as in *Salas v. Cortez*), the minor child (as in *David M. v. Castellanos*), or the county to determine parentage and enforce support. (Welf. & Inst. Code, § 11350.1.) While these services are voluntarily provided to all custodial parents, such suits are *mandatory* where the custodial parent is receiving welfare payments. Under this scheme, the present appellants were at a distinct disadvantage in facing the severe consequences of a paternity judgment. Unlike the ordinary civil litigant, appellants were opposed by the full resources of the state, marshalled on the plaintiffs' behalf. Pursuant to a state and federal statutory scheme, designed to enforce the support obligations of absent parents, plaintiffs were represented by the district attorney. Further, these actions were prosecuted at public expense. (Welf. & Inst. Code, § 11475 et seq.; 42 U.S.C § 651 et seq.)

In the present cases, all the responsibilities of fatherhood were imposed by the state on men who were unable to secure the assistance of counsel because they were indigent. Each appellant made a diligent effort to obtain counsel. Both were ignorant of the intricacies of civil practice and one appellant was not even fluent in the English language. Without the assistance of counsel, neither was in a position to respond adequately to the district attorney's discovery requests nor to initiate discovery himself. Without the assistance of counsel, neither was able to procure the assistance of experts to perform blood group tests which might conclusively have exonerated him.[6] Each was found to be the father of a child on the

[6]If mother, child, and alleged father are tested using all three of the most common blood group tests, the ABO, Rh and MNSs systems,

basis of (1) alleged facts which were deemed admitted because not contradicted, and (2) testimony of the mother which was not subjected to cross-examination.[7] In short, without the assistance of counsel, neither appellant was able to defend against the allegations of the complaint. As a result, each was named the father of a child by involuntary default.

A judgment rendered in this manner is not only unfair, it is unreliable. Recognizing the complexity of these proceedings and the importance of their outcome to the state, the mother and the child, the Legislature has afforded the mother and child the assistance of counsel in prosecuting their claim. However, by intervening heavily on behalf of one side in what has traditionally been a private dispute, the state has skewed the outcome of the case. The chances

there is a 55 percent probability that an innocent man will be excluded by at least one of the tests. If four other tests are also used, the probability rises to 92 percent. Use of the HLA tissue typing system alone provides a 78 percent probability of exclusion of an innocent father. (*Joint AMA-ABA Guidelines: The Present Status of Serologic Testing in Problems of Disputed Parentage* (1976) 10 Fam.L.Q. 247, 257-258.) Under California law, if it is the conclusion of all the experts that the blood tests exclude an alleged father, the issue of paternity must be resolved accordingly. (Evid. Code, § 895.)

[7]There are many reasons why the man named by a mother as the father of her child may not necessarily be the father. She may simply not know which of several possible men is in fact the father. Additionally, she may wish to protect the actual father or protect herself from retribution from him. (See generally, Poulin, *Illegitimacy and Family Privacy* (1976) 70 Nw.U.L.Rev. 910, 923-924.) Since cooperation with the district attorney is mandatory for women receiving AFDC, a mother may also simply supply a name in order to avoid termination of welfare benefits. (Gliaudys, *supra*, 53 State Bar J. at p. 322.) Further studies have shown that such testimony regarding the parties' sexual contacts in paternity suits is unreliable. (See Krause, Illegitimacy: Law and Social Policy (1971) pp. 107-108.)

that the significant consequences of fatherhood will be imposed on an innocent man obviously increase dramatically if, because he is unable to afford counsel, the defendant offers no defense. They increase still further if counsel for the plaintiff is a specialist in prosecuting such claims. (See Gliaudys, *supra*, 53 State Bar J. at p. 324.) Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child.[8] If paternity is to be determined in an adversary proceeding at the behest of the state, surely the interests of all concerned demand that the defendant be able to defend fully fairly. He cannot do so when his indigency prevents him from obtaining counsel. (*Ibid.*; Krause, *supra*, at pp. 111-112; cf. *Griffin v. Illinois* (1956) 351 U.S. 12, 19.)

Respondents argue that appellants are not entitled to appointed counsel because they are no different than the ordinary civil litigant and their only interest in the present proceedings is financial. They have been afforded an opportunity to appear and defend, unlike the defendant in *Payne v. Superior Court, supra,* 17 Cal.3d 908, and the would-be litigants in *Boddie v. Connecticut, supra,* 401 U.S. 371. Therefore, it is contended that there has been no denial of due process. It is argued that if appellants are entitled to court-appointed counsel, then counsel would have to be appointed for indigent defendants in every civil

[8]For example, prior to filing suit against appellant in *David M. v. Castellanos,* the district attorney brought a suit on behalf of the same minor child against another man. That man secured counsel, and a request for temporary support was denied for lack of evidence. Suit was then filed against Mr. Castellanos, alleging that *he* was the father of the child. Mr. Castellanos did not attend the hearing on temporary support and was found to be the child's father partially on the basis of testimony given at that hearing.

case. However, the present cases are not ordinary civil actions. Unlike other civil actions, even those in which the state is a party, in these cases the full power of the state is pitted against an indigent person in an adjudication of the existence of a fundamental biological relationship entailing serious financial, legal and moral obligations. Thus, appellants' entitlement to counsel turns on whether the state has a compelling interest that would justify its insistence on denying appellants a fair opportunity to defend.

The state's interest in determining parentage has traditionally been limited to preventing children born out of wedlock from becoming public charges. (See An Act for Setting the Poor on Work (1576) 18 Eliz. 1, ch. 3, § 2, quoted in Krause, *supra,* at pp. 105-106.) The amendments to federal law which gave rise to the present cases were brought about by concerns similar to those that inspired the Elizabethan Poor Laws — the increasing appearance on the welfare rolls of children born out of wedlock. (See Note (1976) 52 Wash. L.Rev. 169, 170.) In recent years nearly half of the families receiving AFDC have had at least one child born out of wedlock. (*Id.*, at p. 177.) Were the state able to recover from absent parents even a portion of the funds expended through the AFDC program, the savings would be substantial. (See *id.*, at p. 172.)

It is clearly within the power of the state to provide for the enforcement of the parental duty to support one's children. The state may further legitimately provide for the expenditure of public funds to assist custodial parents in enforcing the support obligations of absent parents, whether or not the custodial parent is receiving public assistance. Such efforts are a laudable attempt to prevent custodial parents, the overwhelming majority of whom are

women, from having to bear alone the full burden of a mutual decision to engage in sexual relations.[9] However, the legitimacy of this state interest is not at issue here. The issue is simply whether there is any state interest sufficiently compelling to warrant depriving an indigent defendant of counsel at the time the crucial determination is made that he is legally to be considered a child's father.

The state's interest in denying counsel to indigent paternity defendants is largely financial. Respondents argue it will require a greater expenditure of public funds if indigent defendants, as well as plaintiffs, are represented at public expense. In addition, it may become more difficult to identify potential fathers and establish paternity if defendants have the full benefits of the adversary system. However, the state has no legitimate interest in incorrectly ascribing parentage and imposing the obligations of fatherhood on someone other than the child's actual father. Appointment of counsel for indigent defendants will make the fact-finding process in paternity cases more accurate, thereby furthering the state's *legitimate* interests in securing support for dependent children.

Appointment of counsel need not lead to protracted litigation. It may also increase the likelihood that the man who is judicially determined to be a child's father will provide support. A man would seem to be less likely to

[9]The problem of nonsupport is by no means restricted to children born out of wedlock or even to the poor. A study which congress evidently relied upon in enacting the 1974 amendments to the Social Security Act reported that one year after the divorce decree only 38 percent of fathers were in compliance with support orders and 42 percent made no payment at all. By the 10th year after divorce the percentage of fathers no longer paying any child support had risen to 79 percent. Many of these fathers earned over $25,000 per year. (Note, *supra,* 52 Wash. L.Rev. at pp. 172-173.)

voluntarily pay child support if the determination of paternity were rendered in a proceeding in which he did not participate and was not represented. Faced with strong scientific evidence of paternity, many defendants arrive at a settlement with the district attorney without the expense of a trial. (See Gliaudys, *supra,* 53 State Bar J. at pp.319-322.) Further, it should be noted that recoupment of the cost of appointed counsel is possible if it is determined at the conclusion of the proceedings that the defendant has sufficient means. (Gov. Code, § 27712.) If the accuracy and fairness of paternity suits are improved by providing representation for indigent defendants, in the long run the state will actually further its legitimate interests in ascertaining the parentage of minor children and enforcing parental support obligations.

Appointment of counsel will not only advance substantial state interests, it should serve the child's interests as well. The child, to a large extent forgotten in such proceedings, has been termed the "principal plaintiff" in a paternity action. (Krause, *supra,* at p. 108.) In a sense, it is the child's identity that is litigated in a proceeding to determine parentage. Any determination that a particular individual is a child's biological father may have profound sociological and psychological ramifications. Further, the child's rights of support and inheritance against the father are at issue, as well as his or her future obligation to support the father. (Civ. Code, § 206.) "If the child is to have anything, it must have a *right* to have his paternity ascertained in a fair and efficient manner." (Krause, *supra,* at p. 113, emphasis in original.) It is in the child's interest not only to have it adjudicated that *some* man is his or her father and thus liable for support, but to have some assurance that the correct person has been so identified. When the state initiates paternity proceedings, whether on behalf of the mother (as in *Salas v. Cortez*) or the child (as

in *David M. v. Castellanos*), the state owes it to the child to ensure that an accurate determination of parentage will be made.

III.

Accordingly, this court holds that in proceedings to determine paternity in which the state appears as a party or appears on behalf of a mother or child, indigent defendants are constitutionally entitled to appointed counsel.[10] (Accord *Reynolds v. Kimmons, supra,* 569 P.2d 799; *Artibee v. Cheboygan Circuit Judge, supra*, 243 N.W.2d 248.) The extent to which the right to appointed counsel shall apply in cases other than those which are commenced in the future must "turn upon considerations of fairness and public policy." (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829.) Lack of counsel seriously impinges upon the integrity of the fact-finding process. Accordingly, this court concludes that appellants are entitled to the benefit of the rule announced today. Similarly, this rule shall apply to all cases not final as of the date of the finality of this opinion. However, where a judgment of paternity has become final, obligations, and, in some cases, familial relationships have been established by that judgment. Therefore, this court holds that in cases where a judgment of paternity has become final, the fact that the defendant did not have counsel may not be advanced as a reason to attack that judgment. (Cf. *In re Jacqueline H.* (1978) 21 Cal.3d 170, 179.)

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[10] *Ford v. Herndon* (1976) 62 Cal. App.3d 492 is disapproved to the extent that it is inconsistent with this opinion.

The judgments are reversed. These cases are remanded to the trial court with directions to appoint counsel for defendants if they can demonstrate their indigency.

BIRD, C.J.

WE CONCUR:

TOBRINER, J.
MOSK, J.
NEWMAN, J.

SALAS v. CORTEZ
L.A. 30971

DISSENTING OPINION BY RICHARDSON, J.

I respectfully dissent. The majority has, without benefit of any decisional precedent or statutory support, substantially expended the definition of due process to require appointment of counsel to represent defendants in paternity proceedings brought by the state. This action is directly contrary to the United States Supreme Court's recent expession on the matter of appointed counsel in *Scott v. Illinois* (March 5, 1979) 47 U.S.L.Week 4350. In *Scott* the defendant, an indigent, was convicted of shoplifting and fined $50 after a bench trial at which he was not represented by counsel. The statute under which he was convicted provided for a maximum penalty of a $500 fine, one year in jail, or both. The high court held that the Sixth and Fourteenth Amendments do not require a state trial court to appoint counsel for a criminal defendant who is charged with a statutory offense for which imprisonment upon conviction is authorized but not imposed.

The court emphasized "that *Argersinger* [*v. Hamlin* (1972) 407 U.S. 25] did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even where the matter *res nova,* we believe that the central premise of *Argersinger — that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment — is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.*" (Italics added, pp. 4251-4252.) The reasoning of this opinion is compelling and neither the California Constitution (art. I, § 14) nor any interest peculiar to this state indicates that this court should reach any contrary conclusion.

In the two cases consolidated before us, the County of Ventura paid welfare monies for the support of children born out of wedlock. In order to recover these monies and to avoid indefinitely continuing future support payments for the children, the county instituted these proceedings to establish the paternity of the children and to impose on defendants, if they are determined to be the fathers, the obligation to support their children and to reimburse the county for support payments already made. In light of both the objective and nature of such a proceeding, the right to free counsel is not constitutionally mandated.

There are only two types of proceedings in which either the United States Supreme Court or the California courts and Legislature have required appointment of counsel for indigent defendants on due process grounds. The first class of cases is that which may result in a deprivation of liberty, and the second is that in which the state seeks to remove a child from the custody of its parent. Both situations are clearly distinguishable in their nature from the present one and I shall discuss each in turn.

Where a legal proceeding may result in an infringement of a defendant's personal liberty, there is clearly a right to counsel, regardless of whether the action is labelled civil or criminal. A paternity proceeding is obviously a civil suit which cannot result in the deprivation of the defendant's liberty. The only possible consequence of such an action is the imposition of a financial obligation. While the majority focuses on the collateral possibility that a defendant might be jailed for his refusal to pay a support order arising from a paternity suit, such a criminal prosecution, at which the indigent defendant *would* be entitled to appointed counsel, is a totally separate proceeding and not an inevitable sequel to the paternity action itself. Persons under the obligation of a child support order who are truly indigent are rarely jailed. Criminal prosecutions which may result in confinement, like contempt proceedings, in civil nonsupport cases, are usually reserved for cases of willful noncompliance with a court order or willful failure to support, *by those having the ability to do so.* (*Nutter v. Superior Court* (1960) 183 Cal. App.2d 72, 75; Pen. code, § 270.)

While a judgment in a paternity proceeding is admissible in a nonsupport prosecution, it is not conclusive on the issue of paternity nor does it relieve the prosecution of proving guilt of the nonsupport charge beyond a reasonable doubt. (*Patterson v. Municipal Court* (1965) 232 Cal. App.2d 289, 299.) Similarly, although the defendant in a paternity suit, as in any other civil action, might make statements which could be used against him in a subsequent criminal prosecution, the criminal proceeding is tangential to the paternity action and such collateral consequences do not require the appointment of counsel in the paternity proceeding. (*Borror v. Department of Investment, supra,* 15 Cal. App.3d at pp. 539-541; *In re Groban* (1957) 352 U.S. 330.)

In *Ford v. Herndon* (1976) 62 Cal. App.3d 492, the Court of Appeal in discussing the precise question before us concluded as follows: ". . . it must be acknowledged that indigency alone does not require the state to provide free counsel in all legal proceedings. [¶] The absolute due process requirement is that no person be imprisoned for an *offense* unless he is represented by counsel at trial. (*Argersinger v. Hamlin* (1972) 407 U.S. 25, 37. . .; Cal. Const., art. I, § 15.) Unlike the absolute right to counsel mandated by specific provisions of both federal and state Constitutions for individuals accused of criminal offenses, the right to counsel in other than criminal proceedings is conditioned and determined on a case by case basis. (*In re Love* (1974) 11 Cal.3d 179, 189 . . . .)" (Pp. 498-499; see also *State v. Walker* (Wash. 1976) 553 P.2d 1093. [The purposes of a paternity action are twofold: (1) The establishment of paternity; and (2) the imposition of a support obligation if the defendant is found to be the father of the child. The deprivation or restriction of defendant's liberty is never a direct result of a filiation proceeding.])

By reason of the very nature of the two proceedings and the differential consequences to a defendant as a result thereof, the due process protections afforded at public expense to criminal defendants, who may lose their liberty, have been held not to apply to ordinary civil litigants whose primary interest in the outcome of a suit is financial. Thus, "[t]he ordinary civil litigant is not entitled to free transcripts on appeal at public expense." (*Leslie v. Roe* (1974) 41 Cal. App.3d 104, 107.) An indigent debtor has no constitutional right to the waiver of bankruptcy filing fees. (*United States v. Kras* (1973) 409 U.S. 434.) Recipients of social welfare benefits are not entitled to the waiver of filing fees for appellate review of a disputed decrease in welfare benefits. (*Ortwein v. Schwab* (1973) 410 U.S. 656.) It is abundantly clear that the weight of

authority is against extension of the due process rights of criminal defendants and other litigants threatened with the loss of liberty or an important family interest to ordinary civil litigants who, like these defendants, have only a monetary interest in the outcome of the litigation.

As one faced with a possible monetary loss, the defendant in a paternity action is a kinsman to all other defendants in civil suits who may become judgment debtors. The majority supports its position by noting that the defendants here were "opposed by the full resources of the state." (*Ante,* p. [maj. opn., at p. 12].) It is an undeniable fact of life that in many civil suits the parties are unequally matched in terms of legal representation even though there may be potentially serious legal consequences and the defendant's reputation may suffer as the result of an adverse judgment. We need not, and cannot, by judicially rearranging financial burdens seek to equalize all such legal conflicts by fastening a new fiscal obligation on the public taxpayer.

In *Ross v. Moffitt* (1974) 417 U.S. 600, the Supreme Court, discussing the right of criminal defendants to counsel in seeking discretionary appeals, stated that "[T]he fact that a particular service might be of benefit . . . does not mean that the service is constitutionally required." (P. 616.) California has no duty to "duplicate the legal arsenal that may be privately retained" by a defendant. It must only "assure the indigent defendant an adequate opportunity to present his claims fairly . . . ." (*Ibid.*)

The majority contends, however, that a distinction must be made when the state is the plaintiff in the suit. I disagree. There are numerous situations, as with a contract dispute or defense of a tort claim, in which a party finds himself arrayed against the state. To follow the

majority's reasoning free counsel would have to be provided the civil litigant in all these cases as well, in order to restore some imaginary sense of litigation balance.

The majority relies on two cases for the general proposition that a defendant has the right "to appointed counsel under certain circumstances, regardless of whether the action is labelled criminal or civil." Both cases involve proceedings culminating in deprivation of liberty and are thus readily distinguishable from the present case.

In *Specht v. Patterson* (1967) 386 U.S. 605, the defendant was convicted of the crime of indecent liberties under a Colorado statute which provided a maximum sentence of 10 years but was sentenced under the Sex Offenders Act for an indeterminate term of from 1 day to life imprisonment. The requisite procedure, a complete psychiatric examination and a report thereof given to the trial judge before sentencing, was complied with in the defendant's case, but no hearing was held. The Supreme Court held that the invocation of the act, which entailed the making of a new charge leading to *criminal* punishment, requires, under the due process clause, that petitioner should be present with counsel and have available the other rights attendant on any criminal hearing. The court specifically determined that "The punishment under the second Act is *criminal* punishment . . . ." (P. 608, italics added.)

Similarly, in *In re Gault* (1967) 387 U.S. 1, the United States Supreme Court saw the similarity to the aims and objectives of criminal law enforcement when it upheld the right to counsel in a juvenile court proceeding which could result, upon a determination of delinquency, in a commitment to an institution in which the juvenile's freedom is curtailed. No possible limitation of freedom is present in the paternity hearing and thus the principles espoused in *Gault* are manifestly not applicable.

Other cases cited for the general proposition that "due process has been held to include the right of an indigent defendant to appointed counsel in certain civil proceedings" are similarly inapposite. In *Artibee v. Cheboygan Circuit Judge* (Mich. 1976) 243 N.W.2d 248, the state statute dealing with paternity action provided that a warrant could issue upon the filing of such a suit. The defendant in that case was in fact arrested. Upon arraignment the defendant's failure to make the required recognizance or cash deposit could result in his commitment to county jail. Thus, again, in that case incarceration was possible. Under California statues such an arrest in a paternity action is not possible.

The majority cites only one case dealing directly with the matter of paternity suits which even arguably supports its position, namely, *Reynolds v. Kimmons* (1977) 569 P.2d 799, in which the Supreme Court of Alaska, by a two-to-one vote, held that due process requires appointment of counsel for an indigent defendant in a paternity suit in which the mother was represented by the state. Nothing in the facts of that case, however, indicate whether the state had expended welfare monies to support the child or had any obligation to do so. In the *Reynolds* case, therefore, it is unclear whether the state had any pecuniary interest of its own to protect.

By way of contrast, the purely economic interests of California in prosecuting paternity actions is underscored by the fact that in the case of a mother who has received welfare benefits, such parent is not even a necessary party and the action may be brought in the state's own name as an assignee of the parent's rights. (42 U.S.C. § 602(a)(26); Welf. & Inst. Code, §§ 11350.1, 11476.) While I note that there is provision in the California statutory scheme for the involvement of the state in a paternity action even

when the state has made no payment of funds, such a case is not before us now and we need not determine at this juncture how the right to counsel issue would be resolved in such a suit when California has no financial stake in the result.

While *access* to the courts is constitutionally protected, this access need not be guaranteed in the form of free counsel. In *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914, cited by the majority, we held that the unqualified deprivation of a prisoner's access to the courts to protect his property rights constitued a violation of his rights under the due process and equal protection clauses of both the federal and state Constitutions and we left it to the individual courts to determine how such access would be guaranteed. We cautioned ". . . we emphasize the limits of our holding. We have not ruled that all indigents have a right to counsel in civil cases." (P. 926.) In *Boddie v. Connecticut* (1971) 401 U.S. 371, also cited by the majority the issue again was strictly one of access. The Supreme Court there concluded that due process prohibited a state from denying court access to individuals seeking dissolution of their marriages simply because they were unable to pay court fees. Access to these persons could be provided by allowing waiver of the requisite fees.

Appellants here do not allege that they were denied access to the courts. They were personally served and thus properly notified of the proceedings. There is no indication that their lack of personal funds deprived them of an opportunity to defend themselves. Both were offered and received assistance in learning how to present their cases in propria persona. Both were apparently physically able to come to court although neither chose to do so. Even though appellant Cortez is apparently unable to speak English, the court appointed an interpreter for him and he

was evidently able to communicate sufficiently with the legal aid society in Spanish for them to prepare a declaration in English for him to sign.

The record does not disclose whether appellants attempted to find counsel on a pro bono basis. It is regrettable that the legal aid society was unable to represent them, and if, as contended by the legal aid society, proceedings of these types involve "basic, fundamental rights" the society may wish to reconsider its priorities in determining which cases to accept.

Our courts and Legislature have also provided for appointment of counsel in proceedings in which the state seeks to deprive a parent of the custody of a child. In *In re Jacqueline H.* (1978) 21 Cal.3d 170, we held that an indigent person is entitled to appointed counsel when appealing from a judgment following a hearing for permanent termination of her parental rights and to remove her child from her custody. From this fact the majority argues that because a paternity proceeding also involves the parent-child relationship that the defendant, like the mother in *Jacqueline H.*, must be provided counsel. I am unpersuaded.

First, the majority fails to acknowledge that the Legislature has specifically provided statutorily for the appointment of counsel at the hearing aimed at removing custody from a parent. (Civ. Code, § 237.5; Welf. & Inst. Code, § 634.) It follows that appointment of counsel on appeal from a judgment after such a hearing is merely a logical concomitant of that legislatively created right. No such legislation affects the matter before us.

Second, the essential difference is patent between proceedings to *terminate* natural parental relationships and actions to *establish* paternity. Cases such as *Jacque-*

line H. concern an existing familial relationship which the adult wishes to continue. All paternity proceedings, by definition, involve the *denial* of the parental relationship and the opposition to the establishment of such a relationship. "Basic, fundamental rights" are clearly involved in the former; only economic interests are involved in the latter. Surely only the most cynical logician could conclude that the same due process rights attendant on the claim of custody attach as well to the denial of paternity, and that the state's obligation is no greater in the former than in the latter. It is fair to ask — what *familial* interest is being served by furnishing free counsel to a defendant who is fighting *against* the establishment of a paternal relationship? The majority has inverted the affected interests.

It seems self-evident that the central issue in paternity suits is neither the establishment or maintenance of the family unit nor the parent's bond with the child. What is at stake is money. The state wishes to place the financial responsibility for support of the child on a legally responsible adult. It only this financial obligation that can be imposed. The state cannot, despite the majority's allusion to "moral" obligations, order a man to act as a father; it can only designate him as such. I am unable to accept the majority's belief that "if an indigent is provided with counsel and adjudged to be the father of a child after a fair hearing based on scientific evidence, he is more likely to fulfill his support obligations." (*Ante,* p. [maj. opn., at p. 18].) Such undocumented speculation is readily dispelled by the statistics in its own footnote 9 (*ante*, p. [maj. opn., at pp. 16-17]) which very strongly indicates that divorced fathers, who presumably are *not* contesting the paternity of their children, are less than cooperative in their compliance with support orders. In the context of a resisting father the usual paramount motivation is the *financial* implication not the imposition of an unwanted

personal relationship which the court lacks power to monitor in any event.

Nevertheless, whatever one's belief concerning the consequences of these judgments to these appellants, the solution does not die in creating by judicial fiat a constitutional right to appointed counsel in paternity proceedings. It is my view that the financial implications of such a decision may very well be tremendous amd beyond our capacity to determine. If the civil litigant is now to be furnished free counsel, what of the expenses of extensive discovery, and can the cost of the retention of an expert witness be far behind? The majority is strangely silent on the critical question — who is going to pay for counsel? Is it to be, as in *Payne,* a pro bono responsibility of the bar? Is it the Legislature which must appropriate for it from public funds? Once again, it is the Legislature which should determine by what means and to what extent the public should provide free legal services in civil matters. Thus far the Legislature has made no provision for such appointments in the Uniform Parentage Act (Civ. Code, § 7000 *et seq.*). Indeed, when originally introduced as Senate Bill No. 347 in the 1975-1976 Legislature, the act contained a proposed section 7019 which would have expressly required that the court appoint counsel for a party financially unable to employ counsel. This provision was expressly deleted, and that fact should tell us something.

What the majority expresses today is not constitutional interpretation; rather, it is the majority's personal subjective judgment of "fundamental fairness." It bears repeated expression that due process requirements neither necessitate nor allow such an expansion of the obligation of the state on such nonconstitutional standards as personal views of fairness. It is the people themselves and the Legislature which represents them and not the courts

which are constitutionally vested with the power to amend and expand the Constitution. Tempted frequently as they may be, courts should not usurp that power in order to rearrange in accordance with their own views, the financial relationship in a civil case between the public entity and an indigent defendant.

I would affirm the judgments.

RICHARDSON, J.

WE CONCUR:

CLARK, J.
MANUEL, J.

Order Denying Rehearing

L.A. No. 30971

In the Supreme Court of the State of California

IN BANK

SALAS

v.

CORTEZ

DAVID M., A Minor, ETC., ET AL.

v.

CASTELLANOS

Respondents' petition for rehearing DENIED.

Clark J., Richardson, J., and Manual, J., are of the opinion that the petition should be granted.

SUPREME COURT
FILED
MAY 16, 1979
G.E. BISHEL, CLERK

BIRD

Chief Justice

APPENDIX B

In the Court of Appeal State of California

SECOND APPELLATE DISTRICT
DIVISION FIVE

2d Civil No. 49976
(Ventura County Sup. Ct. No. D69373)

2d Civil No. 49977
(Ventura County Sup. Ct. No. D74905)

CONSOLIDATED CASES

JULIA ANN SALAS,

Plaintiff and Respondent,

v.

MIGUEL MARTINEZ CORTEZ,

Defendant and Appellant.

DAVID JOSEPH MORALES, a minor by FRANK J. ADAMICH, his guardian ad litem, and COUNTY OF VENTURA,

Plaintiffs and Respondents,

v.

DAVID DURAN CASTELLANOS,

Defendant and Appellant.

APPEALS from judgments of the Superior Court of Ventura County. Robert R. Willard and Lawrence Storch, Judges. Affirmed.

Richard A. Weinstock and John A. Lefcourte (Legal Aid Association of Ventura County) for Defendants and Appellants.

APPENDIX C

James O. Barney and George Chaffey (Contra Costa Legal Services Foundation); Rosalyn M. Chapman (California Rural Legal Assistance Cooperative Legal Services Center); Erica Hahn and Joseph Charney (Legal Aid Foundation of Los Angeles) as amici curiae on behalf of Defendants and Appellants.

Evelle J. Younger, Attorney General; Jack R. Winkler, Chief Assistant Attorney General; Lawrence P. Scherb II, Andrew D. Amerson and Pamela Nelson, Deputy Attorneys General, for Plaintiffs and Respondents.

In these paternity and enforcement of child support proceedings, appellants, Miguel Martinez Cortez and David Duran Castellanos, were each found to be fathers of minor children and were ordered to pay child support. In consolidated appeals they argue that they were constitutionally entitled to have a court appointed attorney represent them at public expense.

In No. 49976, Julia Salas, the mother of a child, Miguel Martinez, born out of wedlock on January 28, 1972, brought an action to establish that appellant Miguel Martinez Cortez is the father of the child and to enforce his obligation to support the child. Salas was represented in the action by the District Attorney of Ventura County; she had received welfare benefits from the county (Aid to Families with Dependent Children, AFDC).

In No. 49977, the plaintiff is the minor child, David Joseph Morales, through is guardian ad litem, a family support officer in the office of the Ventura District Attorney. The minor was born out wedlock to Cathy Morales on February 6, 1973. The action sought to have appellant David Duran Castellanos declared the father of

the child. In the first cause of action, the minor sought child support. In the second cause of action, the County of Ventura sought reimbursement for support which it had provided to the minor. The minor and the county were represented by the district attorney.

California law authorizes the district attorney on behalf of the county to bring actions to enforce the child support obligations of an absent parent of a child receiving welfare benefits and for reimbursement of benefits provided. (Civ. Code, § 248; former Welf. & Inst. Code, §§ 11350, 11475, 11488.)

Such actions received added impetus in 1975 when Congress enacted Public Law No. 93-647 and appropriated money "[f]or the purpose of enforcing the support obligations owed by absent parents to their children, locating absent parents, establishing paternity, and obtaining child support . . . ." (42 U.S.C § 651 et seq.) The federal law requires the states to adopt a plan for enforcing such obligations, and reimburses the states for 75 percent of certain expenses involved in such enforcement activity. (42 U.S.C. §§ 654, 655.) The regulations authorize such 75 percent reimbursement for the expenses of cooperative agreements with court and law enforcement officials such as district attorneys for the enforcement of the act. (45 C.F.R. §§ 304.20, 304.21.)

California has enacted new legislation to conform to the federal program. As a condition of eligibility for AFDC benefits, the parent receiving aid must assign to the county any rights to support from any other person and cooperate in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed. (Welf. & Inst. Code, § 11477.) It is the duty of the district attorney to investigate nonsupport or paternity and take all steps necessary to obtain support for the needy child and

determine paternity in a case of child born out of wedlock. (Welf. & Inst. Code, § 11476.) The district attorney may bring an action to establish paternity, to enforce the absent parent's child support obligation, and to seek reimbursement to the county of support which the county has provided to the family. (Welf. & Inst. Code, §§ 11350, 11350.1, 11475 et seq.) The district attorney's child support enforcement services are, however, available to all individuals whether or not they are recipients of public social services. (Welf. & Inst. Code, § 11475.1.)

According to a declaration submitted to the trial court below, federal financial support for the district attorney's paternity and child support enforcement services has apparently led to a significant increase in such activity by the Ventura County District Attorney. This increase has, in turn, apparently led to increases in work loads of agencies who represent indigent defendants. The Legal Aid Association of the County of Ventura represents appellants on this appeal and seeks to establish a constitutional right of indigent defendants in paternity actions to have counsel appointed for them at public expense.[1] While we recognize the potential difficulties faced by these individual appellants and the Legal Aid Association, there is no authority which requires or authorizes the court to appoint counsel for indigent defendants in such proceedings, nor is there a constitutional right to such appointment.

NO. 49976, SALAS v. CORTEZ

The complaint to establish paternity and provide child support in *Salas v. Cortez* was personally served on

[1]The court has also received and considered an amici curiae brief submitted jointly by attorneys of the Contra Costa Legal Services Foundation, California Rural Legal Assistance Cooperative Legal Services Center, and Legal Aid Foundation of Los Angeles.

appellant Miguel Martinez Cortez on September 29, 1975. He answered the complaint in propria persona on October 27, 1975, denying all allegations of the complaint.

On February 17, 1976, appellant Cortez submitted a declaration requesting that the court appoint counsel for him. The Legal Aid Association of Ventura County assisted him in preparation of the declaration. It stated: That he is not the father of the child; that he does not speak, read, or write English and does not understand numerous documents filed by the district attorney's office; that he needs the assistance of an attorney but is unemployed and cannot afford one; that the offices of California Rural Legal Assistance in Santa Maria and the Legal Aid Association of Ventura County in Oxnard informed him that they could not advise or represent him because, although he qualified for their services, they do not have enough attorneys to advise or represent defendants in this type of matter; and that private attorneys had requested fees of $500 to represent him, which he could not afford. The court impliedly denied the appointment of counsel.

On March 15, 1976, Cortez appeared before the court. An interpreter was appointed, and Cortez was ordered to answer the district attorney's interrogatories. Cortez never answered the interrogatories nor did he answer the district attorney's request for admissions pursuant to Code of Civil Procedure section 2033 (see now, § 2030, subd. (e)): "1. That defendant is the father of Miguel Martinez, born January 28, 1972. [¶] 2. That defendant is able to pay child support in the amount of seventy-five dollars ($75.00) for support of Miguel Martinez . . . ." The district attorney sent a letter to Cortez warning him that "[u]nless you take proper legal steps prior to trial, it is our intention to obtain a court order in accordance with matters contained in the request for admissions."

Cortez did not appear for trial May 12, 1976, nor did counsel appear for him. Julia Salas testified, the court took judicial notice of the request for admissions, and the district attorney's letter was admitted into evidence. The court found Cortez to be the father of the child and ordered him to pay child support of $75 per month and $300 in past temporary support ordered, all payable through the district attorney's office.

The notice of appeal and designation of record on appeal were filed on Cortez' behalf by the Legal Aid Association.

NO. 49977, MORALES v. CASTELLANOS

The complaint to establish paternity, to provide support and for reimbursement of welfare funds was personally served on appellant David Duran Castellanos on September 25, 1975. He answered the complaint in propria persona on November 7, 1975, denying all the allegations of the complaint and requesting that the court appoint an attorney for him. On November 18, 1975, the Legal Aid Association filed on his behalf a motion for appointment of counsel and declarations and points and authorities in support thereof. Castellanos declared that he is unemployed and cannot afford an attorney; that the public defender had declined to represent him because it was a civil matter; that he has "sought assistant from the Legal Aid Association of Ventura County but they say they do not represent defendants in cases of this nature although they will prepare papers so that I can try to defend myself"; and that he had sought the assistance of private attorneys, but they required fees of $500 to $1,000 which he could not afford to pay.

Richard Weinstock, executive director of the Legal Aid Association of Ventura County, declared: That the Legal

Aid Association of Ventura County employs 7 attorneys and represents approximately 3,000 persons per year "in all areas of Civil Law, including [paternity actions such as this one], consumer complaints, garnishments, wage claims, welfare, social security, veterans benefits, unemployment insurance, landlord/tenant, public housing, dissolutions, guardianships, adoptions, immigration, driver's license revocations, employment discrimination, housing discrimination, education, housing code violations, real property transactions, income taxes, probate and occupational health and safety"; that the association currently represents 10 defendants in paternity actions such as this; that the number of district attorney filings in such matters is expected to increase in 1975-1976 to 1,900 patenity actions and 5,000 civil complaints as a result of the federal subsidy; that [t]hese increased filings by the District Attorneys Office have resulted in our office being involved in a disproportionate number of such cases to the detriment of our representation in other areas of Civil Law. Accordingly, I have directed the attorneys in our offices to refrain from representing new applicants for our services in such paternity or reimbursement cases. [¶] The current policy, therefore, is to advise such indigent applicants, attempt to secure private representation and if unsuccessful help the applicant file an Answer in propria persona if it appears that he has meritorious defense"; and that for these reasons the association would not represent Castellanos or serve as appointed counsel without compensation.

After receiving the county's points and authorities in opposition to the motion, the court denied the motion for appointment of counsel. Interrogatories and request for admissions were served on Castellanos, which he never answered.

Castellanos did not appear at trial June 9, 1976, nor did

counsel appear for him. The matter was submitted on the transcript of the testimony of the mother, Cathy Morales, at the hearing on the previous motion for temporary child support, and documentary evidence. The court found Castellanos to be the father of the child, and ordered him to pay $50 per month child support and to reimburse the County of Ventura $1,214.50 for past support provided by the county, all payable through the district attorney's office.

A notice of appeal and designation of the record on appeal was prepared on Castellanos' behalf by the Legal Aid Association.

DISCUSSION

Appellants contend that an indigent defendant in a paternity and enforcement of child support action brought by the district attorney has a constitutional right to have an attorney appointed for him at public expense. This argument was recently rejected in *Ford v. Herndon,* 62 Cal. App.3d 492, 498-499, where the court stated:

> "The absolute due process requirement is that no person be imprisoned for an *offense* unless he is represented by counsel at trial. (*Argersinger v. Hamlin* (1972) 407 U.S. 25, 37 [32 L.Ed.2d 530, 538-539, 92 S.Ct. 2006]; Cal. Const., art. 1, § 15.) Unlike the absolute right to counsel mandated by specific provisions of both federal and state Constitutions for individuals accused of *criminal* offenses, the right to counsel in other than criminal proceedings is conditioned and determined on a case by case basis. (*In re Love* (1974) 11 Cal.3d 179, 189 [113 Cal. Rptr. 89, 520 P.2d 713].)

"We are not confronted by a criminal or quasi-criminal proceeding, nor are any personal freedoms involved requiring us to undertake a balancing test of the circumstances to determine if, in fairness, counsel must be afforded.

"The instant proceeding is a civil action instituted by Sarah Ford in an effort to have defendant legally declared to be the natural father of her child born out of wedlock. The happenstance that her counsel is public rather than private does not change the nature of the proceeding or bring it within the area of a case by case determination of need in civil proceedings such as described in *Cleaver v. Wilcox* (9th Cir. 1974) 499 F.2d 940. California has by statute required appointment of counsel or authorized it (Civ. Code, § 237.5; Welf. & Inst. Code, § 634) in proceedings involving potential loss of parental custody to public authority. (Civ. Code, § 232; Welf. & Inst. Code, § 600.) That requirement or authority has not by legislative fiat or judicial decree been extended to paternity determinations. The due process claim to counsel is without merit." (Emphasis in original.)

Appellants attempt to distinguish *Ford* on the ground that the quoted discussion was dictum, since the record on appeal in that case did not actually establish the defendant's indigency. (*Id.*, at p. 498.) This distinction is unpersuasive. The court squarely faced the issue, and in our opinion correctly resolved it.[2]

There is no constitutional right to appointed counsel for

[2]Petition for hearing in the California Supreme Court was denied December 2, 1976.

indigent defendants in cases which do not involve criminal or quasi-criminal proceedings. (*Hunt v. Hackett*, 36 Cal. App.3d 134, 137-138.) This proceeding to establish paternity is not criminal or quasi-criminal. Only if appellants wilfully fail to support their children would they be subject to a subsequent criminal prosecution under Penal Code section 270. While the judgment in the instant case would be admissible in such a proceeding, pursuant to Penal Code section 270e, it would not be conclusive on the issue of paternity nor would it relieve the prosecution of proving guilt beyond a reasonable doubt. (*Patterson v. Municipal Court*, 232 Cal. App.2d 289, 299.) Although conceivably the defendant in the paternity action might make statements which could be used against him in a prosecution under Penal Code section 270, the criminal proceeding is collateral to the paternity action, and such collateral consequences do not require appointment of counsel in the paternity proceeding. (*Borror v. Department of Investment*, 15 Cal. App.3d 531, 539-541 (possibility of subsequent criminal action does not require appointment of counsel in administrative proceeding).)

If appellants fail to obey the order of the court to pay child support, they could be found in contempt of court pursuant to Code of Civil Procedure section 1209.5. However, this is true of violations of court orders generally. (*Id.*)

Appellants correctly point out that the consequences of a finding of paternity are extremely significant, but these consequences are primarily financial; they are not quasi-criminal. The duty to support one's child may conceivably be enforced beyond the child's majority (Civ. Code, § 206); the child will inherit if the parent dies intestate (Prob. Code, §§ 221-222, 255, subd. (d)) or if the parent leaves a will which does not affirmatively exclude the child

(Prob. Code, § 90); court-ordered child support is not dischargeable in bankruptcy (11 U.S.C. § 35(a)(7)); and is more freely enforceable by garnishment than ordinary debts (15 U.S.C. § 1673(b)(1)). These are differences in degree, but not in kind, from ordinary civil judgments. A judgment of paternity may adversely affect the parent's reputation, but this is also true of many types of civil judgments.

Appellants' analogy to cases where custody of the child is *taken from* a parent (*Cleaver v. Wilcox, supra,* 499 F.2d 940) obviously is not valid. Different types of interests are at stake in such proceedings, whereas primarily economic interests are involved here. Furthermore, the authority for appointment of counsel in such removal of custody cases was provided by the Legislature (Civ. Code, § 237.5; Welf. & Inst. Code, § 634), not by judicial fiat. (*Ford v. Herndon, supra,* 62 Cal. App.3d at p. 499.)[3]

There is simply no statute or case which authorizes the court to appoint counsel for appellants in this type of proceeding. Whether to provide counsel at public expense in such proceedings is not up to this court but to the Legislature, which must weigh the different interests involved. The Legislature has made no provision for such appointment in the Uniform Parentage Act (Civ. Code § 7000 et seq.). Indeed, when originally introduced as Senate Bill No. 347 in the 1975-1976 Legislature, the act contained a proposed section 7019 which would have expressly required that the court appoint counsel for a party financially unable to employ counsel. This provision was deleted.

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[3] In *Cleaver* the court was concerned with setting forth guidelines for the *discretionary* appointment of counsel as authorized by then section 634.5 of the Welfare and Institutions Code. (*Id.*, at pp. 942, 945.)

In addition to their main argument based upon constitutional due process and equal protection for indigents, appellants raise several other contentions which clearly lack merit. First, it is contended that Congress intended to fund the costs of counsel for both the plaintiff and the defendant, and that a state program which fails to finance defense counsel is inconsistent with federal law. On the contrary, there is nothing in the federal act, federal regulations, or legislative history which indicates an intent to authorize or require the funding of appointed counsel for indigent defendants. (See 42 U.S.C. §§ 654(7), 655; 45 C.F.R. §§ 304.20, 304.21 (1975); 1974 U.S. Code Cong. & Admin. News, at pp. 8152-8153.)

It is argued that in authorizing the district attorney to bring a "paternity" action, Welfare and Institutions Code section 11475 et seq. unlawfully discriminate against males. This contention is without merit. As a practical matter it would be extremely rare to have to bring a court action to establish a mother's "maternity." If such case arose, the statutes would be construed to authorized an action against the mother and thus males and females would be treated equally. (*Crookham v. Smith,* 68 Cal. App.3d 773, 779 [Welf. & Inst. Code, § 11350.1]; Civ. Code, § 7015; see Commissioners' comment to § 21 of the Uniform Parentage Act [Civ. Code, § 7015] at 9 Uniform Laws Annotated, p. 464 (1974-1977 Supp. Pamphlet).)

Appellants' contention that unless counsel is appointed for the defendant the paternity proceeding merely "rubber stamps" the district attorney's investigation and therefore unlawfully "delegate[s] the judicial power of the state to the district attorney," is obviously without merit. Likewise without merit is the argument that the plan violates the rights of the mother and child to control their own litigation.

Clearly the child cannot choose for itself when to litigate the matter. In the case of a parent who has received welfare benefits, such parent is not even a necessary party and the action is brought in the state's own interest as assignee of the parent's rights. (42 U.S.C. § 602(a)(26); Welf. & Inst. Code. §§ 11350.1, 11477.) In the case of a parent who has not received welfare benefits, the district attorney would not likely proceed except at the parent's request. (Welf. & Inst. Code, § 11475.1.)

CONCLUSION

Appellants were personally served and thus properly notified of these proceedings. It is regrettable that they were unable to find counsel to represent them on a pro bono basis or that the Legal Aid Association chooses to give higher priority to other types of legal matters. Since appellants were neither represented by counsel nor did they appear at trial, we are left with a sense of incompleteness of the record. Whenever one's misgivings about the consequences of these judgments to these appellants, however, the solution does not lie in creating by court decision a constitutional right to appointed counsel for indigent defendants in civil cases. The financial implications of such a decision are huge and beyond the capability of this court to determine. It is primarily the Legislature which must determine whether and by what means and to what extent the taxpayers should support the defense of such cases.

Appellants of course argue that these proceedings are unique, and that the declaration of a constitutional right to appointed counsel in such proceedings would not necessarily lead to finding that right in other cases. We are not persuaded by that argument. Appellants' liberty is not at

stake. These actions are clearly civil in nature. To judicially declare a right to court-appointed counsel in these cases would inevitably lead to demands on other courts to extend the right to other government-initiated proceedings which involve significant financial or collateral consequences.[4] We decline to declare such a right, which is not supported by existing authority.

The judgments are affirmed.

CERTIFIED FOR PUBLICATION

ASHBY, J.

I concur:

HASTINGS, J.

Kaus, P.J. Dissenting

These appeals present a well-encapsulated question of constitutional import: whether the state can impose the direct and indirect, civil and criminal consequences of a paternity judgment on an unrepresented indigent. The unique statutory framework, substantive and procedural, that surrounds paternity actions and judgments refutes the suggestion that a negative answer to that narrow question compels a quantum leap to the propostion that all indigent civil defendants are entitled to appointed counsel. It is the genius of the common law method that it permits us to proceed incrementally, with convenient resting places where we may look, listen, and, if so advised, stop or even

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[4]If, as contended by the Legal Aid Association, these types of proceedings involve "basic," "fundamental" rights, the association may well have to consider reordering its priorities away from other types of cases involving less important rights.

retreat. If the courts had permitted themselves to be paralyzed by the "where will it all end" syndrome, *Betts v. Brady* would still be good Sixth Amendment law, while *Winterbottom v. Wright* would be the last word on products liability.

It is my belief that the interests involved in a paternity action compel the conclusion that fundamental fairness requires the appointment of counsel for an indigent defendant. Even if this result is not compelled by any single factor considered in isolation, cumulatively the stakes are too fundamental to permit us to require an indigent to go it alone.

First, and most obviously, a defendant in a paternity action is just that: A person involuntarily before the court. (See *Payne v. Superior Court* (1976) 17 Cal.3d 908, 926-927.)

Second, the interest involved — that of the parent-child relationship — is a significant one, deserving of somewhat different treatment than ordinary disputes. (See *In re Lisa R.*, (1975) 13 Cal.3d 636, 640.)

Third, the consequences of ajudgment that a defendant is the father of a child are momentous. The relationship of parent and child does not terminate when the child reaches majority. Thus, because the judgment determining the existence of that relationship "is determinative for all purposes" — except for actions brought under Penal Code section 270, discussed below — the result of these proceedings may follow the defendant to the grave (Civ. Code, § 206)[1] and beyond. (Prob. Code, § 255, subd.

[1]Civil Code section 206: "It is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by work, to maintain such person to the extent of their ability . . . ." (See *Paxton v. Paxton* (1907) 150 Cal. 667, 669.)

(d).)[2]

Fourth, the payments ordered in the judgment — or in any later judgment of support — are more freely enforceable by garnishment than are ordinary debts (15 U.S.C. § 1673 (b)(1); Code Civ. Proc., § 690.6), and are not dischargeable in bankruptcy. (11 U.S.C., § 35 (a)(7).)

Fifth, the duty of support which follows from a finding of paternity , may affect a defendant's freedom, since a failure to support is subject to criminal prosecution (Pen. Code, § 270), and in a prosecution under that section "the final establishment of paternity or nonpaternity in another proceeding shall be admissible as evidence of paternity or nonpaternity." (Pen. Code, § 270e.)[3] It is hardly a sufficient answer that, as the majority suggests, such evidence is not conclusive. Realistically the paternity trial is a critical stage in the criminal prosecution.

Sixth, the determination that a man has fathered a so-called illegitimate child may affect his reputation. Particularly where the father ignores his children and their mother, his conduct is not approved by society. (See *Jiminez v. Weinberg* (1974) 417 U.S. 628, 632.)

Finally, the disadvantage that is doubtless suffered by any unrepresented defendant in a civil action is further

[2]Probate Code, section 255: "(a) The rights of succession by a child, . . . are dependent upon the existence, . . . of a parent and child relationship between such child and the decedent. . . . (d) [A] parent and child relationship exists where such relationship is . . . established pursuant to, . . . Section 7000 [et. seq.] . . . of . . . the Civil Code." In California, absent a will, a surviving child is entitled to share in the decedent's estate with other surviving children, and/or a surviving spouse. (Prob. Code, §§ 221, 222.) If the decedent dies testate, his children will share in his estate, unless affirmatively excluded. (Prob. Code, §§ 90, 91.)

[3]This proviso in section 270e is apparently the only provision in California law allowing admission of a civil judgment in a criminal action. (See Jefferson, Calif. Evid. Bench Book, § 9.1, pp. 125-128.)

compounded in paternity actions such as these in which the power of the state is brought to bear against the defendant. The action is prosecuted by the district attorney (see Civ. Code, §§ 248, 7006, subd. (f); Welf. & Inst. Code, § 11350), and, once the judgment is obtained, the state may enforce that obligation, either, as discussed, through the criminal process or under the Uniform Civil Liability Act (Civ. Code, §§ 241 et seq.) and interstate assistance statutes. (See 42 U.S.C. §§ 651-655.)

Given these factors, the state's characterization of defendants' position as those of "ordinary civil litigants" is inapposite. Whether we use the label "fundamental" or "significant," or no label at all, too much is at stake in a proceeding to determine the existence of the parental relationship for the indigent defendant to be required to do without counsel. Fairness requires that, notwithstanding the increased costs, the state, must, directly or indirectly, provide such a defendant with an attorney.[4]

I am aware that in *Ford v. Herndon* (1976) 62 Cal. App.3d 492, the Third District ruled, possibly in dictum, that an allegedly indigent defendant in a paternity action is not entitled to free counsel. (62 Cal. App.3d pp. 498-499.) The issue appears to have been raised off-handedly: The chief issue was whether the trial court had abused its discretion in denying the defendant's motion to set aside a default judgment, and the court, in responding to the defendant's contention that he was entitled to appointment of counsel, stated that "nothing in the record indicates that

[4]Amicus on behalf of defendants assert that the state's costs in furnishing indigent defendants in paternity actions with an attorney would be reimbursed by the federal government at the rate of 75 percent. (See 42 U.S.C., §§ 654, 655; Welf & Inst. Code, §§ 11475, et seq.; 45 C.F.R., § 304.20(b)(2), § 304.21 (b)(2). Based on my somewhat casual reading of the rules (see 45 C.F.R. § 304.21(b)(3), the position of amicus may be a trifle sanguine.

defendant is an indigent, and we must presume that the trial court found he was not." (*Id.*, p. 498.) In this consolidated appeal, defendants' right to counsel is the only issue raised, and we have been aided by a vigorous brief filed by amicus on behalf of defendants.

Nevertheless, if I could find a colleague to agree with me that *Ford* is wrong, we would have to consider whether we should follow it, albeit reluctantly. Since that is not the case, I might as well highlight my disagreement by dissenting.

KAUS, P.J.

Supreme Court, U. S.
FILED
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MICHAEL BODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-225

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Petitioner,

vs.

MIGUEL MARTINEZ CORTEZ,

Respondent.

DAVID M., a Minor, by FRANK J. ADAMICH, his Guardian Ad Litem, and COUNTY OF VENTURA,

Petitioner,

vs.

DAVID DURAN CASTELLANOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

RESPONDENTS' BRIEF IN OPPOSITION

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INTRODUCTION

The respondents MIGUEL MARTINEZ CORTEZ and DAVID DURAN CASTELLANOS respectfully request that this Court deny the petition for writ of certiorari, seeking review of the California Supreme Court's opinion in

this case.

Respondents agree with petitioners' preliminary presentations regarding the case under petitioners' topical headings as follows: Opinion Below; Statutory Provisions; and Statement of the Case.

Respondents do not agree with petitioners' preliminary presentations under the following topical headings: Jurisdiction; Questions Presented; and Constitutional Provisions Involved.

QUESTION PRESENTED

Does the United States Supreme Court have jurisdiction to review a decision of the California Supreme Court where the decision rests upon an independent and adequate state ground under the California Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Respondents incorporate herein by reference petitioners' quotation of the United States Constitution, Amendment XIV.

California Constitution, Article I, Section 7, subdivision (a):

"A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

REASONS WHY A WRIT OF CERTIORARI SHOULD BE DENIED

The Decision of the California Supreme Court Rests Upon an Adequate, Independent State Ground, and Therefore Is Beyond the Reviewing Power of the United States Supreme Court

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Petitioners attempt to invoke 28 U.S.C. section 1257(3) as a basis for this Court's jurisdiction. 28 U.S.C. §1257(3) states in pertinent part as follows:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Petitioners' claim appears to be that the California Supreme Court, in granting respondents a right to Court appointed counsel in certain kinds of civil paternity actions, has set up a right under the United States Constitution.

In rendering its opinion the California Supreme Court cited the Due Process Clause of the United States Constitution as well as the Due Process Clause of the California Constitution. It also cited numerous cases handed down by this esteemed Court as well as cases handed down by California courts under the California Due Process Clause. It does not follow that a state supreme court sets up a right under the United States Constitution merely because it refers to federal constitutional provisions and cites cases decided by the United States Supreme Court. To hold otherwise would illogically deprive state courts of the wisdom of this Court in reaching decisions under the constitutions of their home states. Litigants would also be discouraged from citing opinions of this Court, fearing that a reference to a United States Supreme Court decision would jeopardize an argument that a certain right is required under a state constitution.

To avoid such unseemly results, it is well established that if a decision of a state supreme court is sufficiently based upon independent state constitutional grounds, that decision is beyond the reviewing power of the United States Supreme Court. (Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194, 200;

Jankovich v. Indiana Toll Road Commission (1965) 379 U.S. 487, 489; Fox Film Corporation v. Muller (1935) 296 U.S. 207, 210; Murdock v. City of Memphis (1875) 20 Wall. 590, 620.)

The key question is whether the state ground is independent and adequate. In Jankovich, supra, this Court reviewed certain jurisdictional points and discussed its approach in resolving them. One point, akin to the present case and discussed at length in Jankovich, involved decisions of state courts in which similar provisions of state and federal constitutions are analyzed together. This Court concluded that in such cases the state ground is not independent and adequate only if the lower court opinion as a whole leaves the impression that the lower court probably felt constrained to rule as it did because of the Fourteenth Amendment of the United States Constitution or some other federal law. (Jankovich v. Indiana Toll Road Commission, supra, 380 U.S. 480, 492.)

In Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194, 201, the United States Supreme Court could not decide whether the California Supreme Court's decision was based upon an independent state ground. Rather than deciding the federal constitutional issues, this Court remanded the case to the California Supreme Court for further proceedings for the California court to decide whether its judgment rested on adequate, independent, non federal grounds. This at best is all that petitioners in the present case would be entitled to.

A close reading of Kirchner reveals that it is both consistent with Jankovich and with one of the "not independent and adequate" tests set forth therein, namely, where the state court decision is based on the Fourteenth Amendment. In Kirchner this Court could not conclude that the California Supreme Court decision was based upon the Fourteenth Amendment, and hence the resulting remand. It is important to note that it was not simply the intertwining of federal and state constitutional analysis that created the problem in Kirchner. Rather, it was certain language in the California Supreme Court's decision that created an ambiguity that might have led one to conclude that, indeed, the California court based its decision on the Fourteenth Amendment. As this Court pointed out in Kirchner:

> "The [California Supreme] Court first discussed Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 28 Cal.Rptr. 718, 379 P.2d 22, a case decided under the Fourteenth Amendment, and then stated 'This holding is dispositive of the issue before us.' 60 Cal.2d 720, 36 Cal.Rptr. 488, 388 P.2d 722. (Department of Mental Hygiene of California v. Kirchner (1965) 380 U.S. 194, 198, 199; emphasis added)

The ambiguity was created when the California Supreme Court, despite the express statement that the Fourteenth Amendment was dispositive of the issue, appeared also to rely upon similar

California constitutional provisions.

In the present case, unlike Kirchner, there is no statement that the Fourteenth Amendment or cases cited thereunder were dispositive of the issue involved. Nor does it appear that the California Supreme Court felt constrained to rule as it did solely because of Fourteenth Amendment requirements. Indeed, the California Supreme Court makes it clear in footnote 2 of its opinion that California constitutional provisions are often more protective of individual rights than are federal constitutional provisions. (Salas v. Cortez (1979) 24 Cal. 3d 22, 27, n. 2; Petition for Writ of Cert., Appendix, p. 24; see also, Falk, The State Constitution: A More than Adequate Ground, 61 Calif. Law Rev. 273 (1973).) At footnote 2 the California Supreme Court points out, in refuting the dissent, that the dissenting opinion is based upon the constraints of federal due process, whereas the majority opinion is not.

It is therefore, clear that the California Supreme Court in the case here freely and independently based its opinion on Article I, Section 7, subdivision (a) of the California Constitution as well as the Fourteenth Amendment to the United States Constitution.

Petitioners very craftily attempt to dispose of the jurisdictional issue by burying it in the cryptic language of footnote 1, page 11 of their petition. It is obvious that the brief treatment accorded the issue therein fails to address any of the critical jurisdictional shortcomings of the

petition and is therefore not worthy of further comment.

Whether or not this Court were to agree or to disagree with the California Supreme Court's conclusions regarding the Fourteenth Amendment, the California Supreme Court's decision also rests solidly upon the California Constitution and, as such, constitutes an independent and adequate state ground beyond the reviewing power of the United States Supreme Court.

CONCLUSION

For the foregoing reasons, respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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